

For the reasons stated below, the court will grant Defendant's Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The plaintiff has the burden of proving subject matter jurisdiction when a motion is raised. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982). The district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence by affidavit, depositions and live testimony. *Id.*; *Richmond*,

*Fredericksburg & Potomac R.R. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992). Unlike the procedure in a Rule 12(b)(6) motion, in which the fact finder is presumed to retain the truth-finding role, a court considering a Rule 12(b)(1) motion may evaluate the evidence to determine whether it has subject matter jurisdiction. *Adams*, 697 F.2d at 1219. A motion to dismiss for lack of subject matter jurisdiction should be granted if the material facts are not in dispute and the moving party is entitled to prevail as a matter of law. *Richmond*, 945 F.2d at 768 (citation omitted).

Section 2000e-5(f)(1) of Title VII states that an individual must file a complaint within ninety days of receiving notice of a final decision by the Equal Employment Opportunity Commission (“EEOC”). 42 U.S.C. § 2000e-5(f)(1). Plaintiff received her right to sue letter from the EEOC on October 6, 2006 but failed to file the Complaint until 647 days later. (Def.’s Mot. Dismiss, Doc. 9, p. 2.) Therefore, Plaintiff’s claims are untimely as filing exceeded the ninety-day time period. *Id.* at 4.

Furthermore, Plaintiff is not entitled to equitable tolling because the Fourth Circuit has held that dismissal of a prior Title VII claim without prejudice does not toll the ninety-day limitations period. *Nwaobasi v. First Sec. Fed. Sav. Bank, Inc.*, 105 F.3d 647 (4th Cir. 1997). Even if Plaintiff timely filed her First Complaint, the filing failed to toll the ninety-day period and her Second Complaint is time-barred. (Def.’s Mot. Dismiss, Doc. 9, p. 4.) Therefore, Plaintiff’s Title VII claims are untimely and there is no federal question. *Id.* (citing *Yarborough v. Burger King Corp.*, 406 F. Supp. 2d 605, 609 (M.D.N.C. 2005)). Moreover, supplemental jurisdiction is not available because all federal claims will be dismissed, and such dismissal is proper under Rule 12(b)(1). *Id.* Accordingly,

IT IS THEREFORE ORDERED that Defendant’s Motion to Dismiss is hereby

GRANTED.

Signed: July 7, 2009

A handwritten signature in cursive script, reading "Graham C. Mullen", written over a horizontal line.

Graham C. Mullen  
United States District Judge

